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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED SHOE MACHINERY CORPORATION, *Petitioner,*	
vs.	No. 423
THE HANOVER SHOE, INC., *Respondent.*	

PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Shoe Machinery Corporation prays pursuant to Rule 58(2) for re hearing of the order herein November 21 1960 denying the petition for certiorari dated September 16 1960.

Opinions Below

The District Court's opinion dated February 12 1960 (App. 191a-202a) is reported in 187 F. Supp. 820. The Court of Appeals' opinion rendered June 30 1960 (petition pp. 24-6) is reported in 281 F. 2d 481.

Ground for Re-hearing

Refusal of certiorari in this case produces a contrariety of decision i the determination of liability under the Clayton Act as between the Third Circuit (the decision below) and the Seventh, Eighth and Ninth Circuits (cases cited in petition at pp. 7-10). We think such a result can be due only to inadvertence.

While respondent argued in opposition to certiorari here (br. 3-4) that the Seventh, Eighth and Ninth Circuits were "not in conflict" with the Third, the language and rationale of those cases shows clearly that they are.[1] In that situation we infer that certiorari was denied because the Court was misled into believing that prior cases in this Court had already decided in favor of respondent the question now tendered. These cases are *Chattanooga Foundry & Pipe Works v. City of Atlanta* 203 US 390 (1906), *Thomsen v. Cayser* 243 US 66 (1917), and *Story Parchment Co. v. Paterson Parchment Paper Co.* 282 US 555 (1931).

None of these cases had anything to do with the passing-on question presented by the decision here. They were argued *in extenso* upon the several applications for review (citations and asserted grounds at pp. 10-3 of petition), which this Court rejected, with respect to the decisions in the Seventh, Eighth and Ninth Circuits upon which we rely.

Argument: Respondent's Reliance On Three Principal Cases Is Unfounded and Has Misled the Court

1. In the *Chattanooga Foundry* case, this Court's opinion deals with the statute of limitations (stating, 203 US at 307-9, that the main question was which limitation was applicable under the laws of Tennessee) and also with the contention that plaintiff's business was not a part of interstate commerce. The Circuit Court's decision was a ruling on demurrer based on the statute of limitations (101 Fed. 900). The opinion of the Sixth Circuit Court

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[1] The *Flintkote* case 246 F. 2d 368, cert. denied 355 US 835, also was erroneously relied upon by respondent (br. 4) as disapproving the proposition for which we cited *Wolfe v. National Lead Co.* 225 F. 2d 427, cert. denied 350 US 915. The opinion in *Flintkote* shows that the passing-on question was not even presented, much less determined.

of Appeals was also limited to these two points (127 Fed. 23).

The transcript of record filed February 23 1905 as No. 365 of this Court's October Term 1905 calendar contains nothing to sustain any contention that the passing-on defense was there involved. The motion by defendant Chattanooga for a new trial contained nine points, none of which has to do with the transfer of plaintiff's claimed damage to others (R. 46-50). Most of these assignments alleged error in connection with ascertainment of the market price of cast-iron pipe. The charge of the trial court to the jury (R. 73-81) will be searched in vain for any reference to the passing-on issue. The assignment of errors by defendant does not raise the point, although an objection does appear that plaintiff did not suffer "any damage in its business or property" by reason of the combination complained of (R. 85). This corresponds to the fifth paragraph of the demurrer filed August 16 1901 (R. 27). However, the record discloses no evidence on damage except a comparison from the exhibits of prices paid for pipe with fair market value (R. 41-2).

The brief of defendant in this Court relied principally upon the statute of limitations in the assignment of errors (p. 7) and discussed the Tennessee statute in detail at pp. 15 ff. Plaintiff City of Atlanta relied upon the statement of its case by Judge Lurton: 127 Fed. at 25-8, and then added (p. 7):

> "It would be a work of supererogation on our part to attempt to add to or strengthen the reasons advanced by Judge Lurton in sustaining the court below in its action in overruling the demurrer to plaintiff's declaration."

All this portion of the Sixth Circuit Court of Appeals' opinion dealt with the question of damages to the business of a municipal corporation without attention to any conceivable claim (evidently not made) that the alleged dam-

ages were passed on to and paid by others. From p. 28 of 127 Fed. Judge Lurton's opinion deals with the governing statute of limitations.

Defendant's sole reliance in the *Chattanooga Foundry* case was the intra-state character of plaintiff's business and the statute of limitations. The evidence did not present the passing-on issue; and the decision therefore is not an authority concerning it.

2. *Thomsen v. Cayser* involved an asserted foreign steamship combination which imposed upon plaintiffs excessive freight rates (243 U.S. at 70). Before coming to this Court the case had two trials. On the first it was dismissed on plaintiffs' evidence by reason of the court's conclusion that no cause of action had been established under the Sherman Act (149 Fed. 933). Plaintiffs obtained a reversal in the Circuit Court of Appeals in 1908 (160 Fed. 251). Upon the second trial plaintiffs obtained a jury verdict of $7,573.06 before trebling or the addition of an attorney's fee. This was reversed July 20 1911 by a majority in the Second Circuit Court of Appeals on the ground that the intervening *Standard Oil* and *Tobacco* cases, decided in May 1911, made the question of reasonableness of the restraint controlling and that the record did not enable the court to find that the acts of defendants amounted to a combination in unreasonable restraint of trade (190 Fed. 530).

The absence from *Thomsen v. Cayser* of any passing-on issue is clear from defendants' assignment of errors in the Second Circuit Court of Appeals following the second trial. This assignment, filed July 7 1909, is at R. 192-200 of the record in this Court, contains 32 items, and may be searched in vain for any reference to passing-on. Similarly the charge to the jury by Judge Hazel at R. 153-66 is devoid of any reference to plaintiffs' having transferred to others the 10% "primage exaction" which they claimed to be the

unreasonable rate imposed on them by the combination. The subject of damages which the jury might find is discussed more particularly at R. 100-2. The court pointed out that plaintiffs were entitled only to "actual damages in the nature of compensation", that the jury must determine whether the 10% primage was an excessive rate charged to prevent plaintiffs from patronizing other lines, and that in such event plaintiffs were entitled to recover back the primage just as if they had remained loyal shippers, the amount being shown beyond dispute as $5,000 (R. 101). The court also held that the jury might determine whether plaintiffs had been coerced into a loss of profit involving three items totalling $2,950 (R. 101). Finally the court said that the jury must determine whether plaintiffs had been coerced into a failure to ship by the Hansa Line at a saving of $6,700 (R. 102). The verdict was for $5,000 with interest (R. 107), viz. the exact amount of the 10% primage exaction.

Incidental reference was made by defendants in their brief in this Court (pp. 49-52) and in their supplemental brief on re-argument (pp. 22-3) that the facts "do not show injury to the plaintiffs". But no evidence was cited for any contention that the illegal exactions were passed on to third parties. The burden of the argument was that the evidence was equally consistent with a lawful exaction.

In this Court the argument and decision dealt with the reasonableness of the restraint, its effect on foreign commerce, and rulings as to damages. But none of these rulings involved any evidence that plaintiffs were made whole by their customers, as in the instant case.

3. *Story Parchment* dealt with a conspiracy between defendants and a third party to monopolize interstate commerce in vegetable parchment with the result of excluding plaintiff therefrom and destroying its business. This Court restated the jury's verdict for plaintiff in the sum of

$65,000, with discussion of the requirements of certainty in damages. The matter of plaintiff's passing on any loss could not have been presented, since the only questions submitted to the jury were loss of profits due to the forced closing of plaintiff's business (282 US at 561) and depreciation in value of its plant (p. 567). On the former point the complaint was, not that defendants over-charged plaintiff (as here), but that defendants instituted an unlawful regime of price-cutting (p. 561) which depressed plaintiff's sale prices "below the point of fair profit and finally below the cost of production" (p. 561).

4. Respondent here in opposing certiorari did not actually say that the foregoing cases disapproved the passing-on defense but only that the decision below "*is in conformity* with decisions of this Court on the same matter" (br. 5). But this is untrue. They are not "in conformity" because they did not involve the point here decided. Even if the possibility of plaintiff's having passed on the damage in those cases lurked somewhere in the record, the decision would not be a precedent for the case at bar. *United States v. Tucker Truck Lines* 344 US 33, 38 (1952); *Webster v. Fall* 266 US 507, 511 (1925), stating:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. [Citations]"

5. At pp. 5-6 of the opposing brief six lower court cases are cited with the statement that they apply "the principles stated in the foregoing leading cases"; viz. *Chattanooga Foundry*, *Thomsen*, and *Story Parchment*. Without extending this petition, we represent to the Court that not one of these six additional cases considered or decided the passing-on issue tendered in the petition herein.

6. The *Chattanooga Foundry*, *Thomson* and *Story Parchment* cases, as well as all other cases within our knowledge which have been decided under the antitrust laws (except the case at bar), are consistent with a sound and reasonable construction of Section 4 of the Clayton Act whereby injury to "business" is limited to an impairment of the competitive position of the plaintiff and injury to "property" includes only such over-charges as have actually been absorbed by the plaintiff. Under such construction damages for injury to business in the monopoly cases would be recoverable only by the monopolist's competitors who were excluded from or driven out of business and damages for injury due to over-charges would be recoverable only by the consuming public where all purchasers from the monopolist paid the same over-charges and passed them on to the consuming public. *Wolfe* v. *National Lead Co.* 225 F. 2d 427 (CA 9 1955) and the four oil jobber cases cited in the petition for certiorari (pps. 7-10) demonstrate the soundness of such construction.

Conclusion

Not only the interest of justice but stability and certainty in the application of the antitrust law justify and require a resolution of the now existing conflict in the Circuits. Any impression which the Court may have received from the opposing brief that three leading cases here already considered the point, is shown to be unfounded and contrary to the fact not only by the opinions but by the briefs and records in this Court.

Hence the writ of certiorari should issue.

Respectfully submitted,

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New York, December 5 1960

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